

April 25, 2019

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Re: Notice of Ex Parte Communication, MB Docket No. 16-142

Dear Ms. Dortch:

On April 23, 2019, Robert Weller and the undersigned, both of the National Association of Broadcasters (NAB), had a telephone conference with staff from the Media Bureau and the Incentive Auction Task Force. A complete list of meeting attendees is copied below. During this meeting, NAB urged the Commission to allow television stations to use vacant in-band channels, where available, to assist in the transition to Next Gen television. In particular, NAB responded to arguments set forth in an *ex parte* presentation submitted by the Open Technology Institute at New America regarding this issue.<sup>1</sup>

In its ongoing Ahab-like pursuit of reserved television channels for unlicensed use, OTI appears to have lost track of its own positions. During the original Next Gen TV rulemaking, OTI, together with other advocacy groups, argued that the Commission should impose new regulatory constraints on broadcasters seeking to invest in their facilities to improve their service. In particular, OTI insisted that the Commission should impose an unprecedented requirement that broadcasters transmit high definition signals in order to protect consumers.<sup>2</sup> Yet now, in its glassy-eyed pursuit of reserved channels for unlicensed use, OTI claims that consumers are already adequately protected by an order that OTI fought tooth and nail, and that the Commission must avoid at all costs the single most productive step it could take to minimize consumer disruption during the Next Gen transition.<sup>3</sup>

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<sup>1</sup> Letter from Michael Calabrese to Marlene H. Dortch, GN Docket No. 16-142, ET Docket No. 14-165 (April 3, 2018) (OTI Letter).

<sup>2</sup> Comments of Consumers Union, Public Knowledge and New America's Open Technology Institute at 9, GN Docket No. 16-142 (May 9, 2017).

<sup>3</sup> OTI Letter at 2.

Worse, OTI has concocted an inaccurate narrative around the origin of this proposal – one that it has pressed before the Commission for well over a year. According to OTI, the Commission’s 2016 Next Gen TV NPRM “did not request comment on whether or not to give broadcasters vacant channels for the transition to ATSC 3.0,” and the issue was only raised in an *ex parte* letter submitted by ONE Media in 2017.<sup>4</sup>

This story is simply untrue. The 2016 Next Gen NPRM directly asked, “should we consider allowing broadcasters to use vacant in-band channels remaining in a market after the incentive auction repack to serve as temporary host facilities for ATSC 1.0 or ATSC 3.0 programming by multiple broadcasters?”<sup>5</sup> OTI was aware of this at one point, because it joined comments addressing this issue for six pages<sup>6</sup> and reply comments chipping in another six pages.<sup>7</sup> Despite the fact that it knows better, OTI continues to frame this issue as a proposal put forward by ONE Media rather than the Commission itself.<sup>8</sup> Nice try.

Setting aside OTI’s conspiracy theory, there is no legal or policy reason to prevent broadcasters from using television channels to improve free local television service with public interest obligations far exceeding those of the companies that fund OTI. Allowing broadcasters to use vacant, in-band channels where available remains the single most helpful step the Commission could take to minimize consumer disruption. We urge the Commission to adopt this proposal.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Patrick McFadden", with a stylized flourish extending to the right.

Patrick McFadden  
Associate General Counsel,  
National Association of Broadcasters

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<sup>4</sup> Comments of Open Technology Institute at New American and Public Knowledge at 5, GN Docket No. 16-142 (Feb. 20, 2018).

<sup>5</sup> *Authorizing Permissive Use of the “Next Generation” Broadcast Television Standard*, Notice of Proposed Rulemaking, 32 FCC Rcd 1670, ¶ 14 (2017).

<sup>6</sup> Public Knowledge and New America NPRM Comments at 23-29.

<sup>7</sup> Reply Comments of Consumers Union, Public Knowledge, and New America’s Open Technology Institute at 16-23, GN Docket No. 16-142 (June 8, 2017).

<sup>8</sup> OTI Letter at 1; Letter from Michael Calabrese to Marlene H. Dortch at 1, GN Docket No. 16-142, ET Docket No. 14-165 (April 1, 2019).

cc: Hillary DeNigro  
Martha Heller  
Evan Morris  
Sarah Whitesell